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BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

UTAH CHAPTER OF THE SIERRA CLUB, et al.,	)	**REPLY BRIEF OF UTAH CHAPTER OF THE SIERRA CLUB, ET AL., ON (1) THE MEANING OF RULE B-15's OBJECTIVE BAD-FAITH ELEMENT; AND (2) APPLICATION OF RULE B-15 IF THE BOARD FINDS THAT PETITIONERS HAD AT LEAST SOME OBJECTIVE GOOD-FAITH BASIS FOR CHALLENGING THE PERMIT**
Petitioners,	)	
v.	)	
UTAH DIV. OF OIL, GAS & MINING,	)	
Respondent,	)	
ALTON COAL DEVELOPMENT, LLC, and KANE COUNTY, UTAH,	)	Docket No. 2009-019 Cause No. C/025/005
Respondents/Intervenors.	)	

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INTRODUCTION

Alton, the Division, and Petitioners all agree that the Board may look to Utah's civil attorney-fee statute in interpreting Rule B-15.[1] That statute allows an attorney fee to be awarded against a party who brings an action that is objectively "without merit" and in subjective bad faith. Utah Code Ann. § 78B-5-825. This stage of the proceeding thus involves the question of what "without merit" means in the attorney-fee context. That question is not difficult, for Utah's courts have already, unequivocally, answered it: Under section 78B-5-825, "[t]o demonstrate that an action is 'without merit,' the party seeking an award of attorney fees must do more than assert that the case was unsuccessful." *Verdi Energy Grp., Inc. v. Nelson*, 326 P.3d 104, 115 (Utah Ct. App. 2014). Rather, as the Division notes, the "without merit" standard requires a showing of frivolousness. DOGM Br. at 9.

This is not just the Division's, or Petitioners,' position. It is the law of this state. Utah courts have consistently held that "'without merit' means 'frivolous' or 'having no basis in law or fact.'" *Baldwin v. Burton*, 850 P.2d 1188, 1199 (Utah 1993) (quoting *Cady v. Johnson*, 671 P.2d 149, 151 (Utah 1983)). It does not simply mean losing. *Verdi Energy*, 326 P.3d at 115; *see also In re Olympus Constr., L.C.*, 215 P.3d 129, 134 (Utah 2009) (holding that a losing claim was not "without merit" because, while losing, it was not frivolous).

[1] *See* Alton Coal Dev., LLC's Mem. of P. & A. in Resp. to the Bd.'s Suppl. Order 4 (Jan. 12, 2015) (Alton Br.); Utah Div. of Oil, Gas and Mining's Mem. of Law re: Request for Add'l Briefing on Att'y Fees Shifting 7 (Jan. 12, 2015) (DOGM Br.); Br. of Utah Chap. of Sierra Club, et al. 6-7 (Jan. 12, 2015) (Pets.' Br.).

I. To recover attorney fees under Rule B-15, a permittee must demonstrate that the opposing party's challenge was frivolous as presented, as well as in subjective bad faith

A. Utah precedent contradicts Alton's claim that the "without merit" standard is met whenever a party loses

Alton's assertion that a "party's claims [a]re 'without merit'" simply because "a party has lost on the merits," Alton Br. at 3, is directly contradicted by clear Utah precedent that establishes the opposite. In *Verdi Energy Group, Inc. v. Nelson*, the Utah Court of Appeals held that "[t]o demonstrate that an action is 'without merit,' the party seeking an award of attorney fees *must do more than assert that the case was unsuccessful*." 326 P.3d at 115 (emphasis added). Likewise, in *Cady v. Johnson*, the Utah Supreme Court held that a claim is "without merit" under the attorney-fee statute only if it "is frivolous"—a term that the Court explained was synonymous with "'of little weight or importance having no basis in law or fact.'" 671 P.2d at 151; *see also Wardley Better Homes & Gardens v. Cannon*, 61 P.3d 1009, 1018 (Utah 2002) (same); *Baldwin*, 850 P.2d at 1199 (same).

Although Alton denies that the "lacking any basis in law or in fact" standard should apply here, *see* Alton Br. at 4-5, Utah courts apply this standard in interpreting the "without merit" prong of the Utah attorney-fee statute that Alton itself has invoked, *see, e.g., Wardley*, 61 P.3d at 1018 (interpreting section 78B-5-825); *Cady*, 671 P.2d at 151 (same). Alton's brief cites these cases, but disregards their holdings, implying that they

say something that they do not say. Utah precedent is clear, and it directly contradicts Alton's argument about the meaning of "without merit" under section 78B-5-825.

Alton's theory that "without merit" means "losing" also is impossible to reconcile with Utah judicial decisions that have refused to conclude that a losing party's claims were "without merit" under the attorney-fee statute—despite the fact that the party lost on the merits. For example, in *In re Olympus Construction, L.C.*, the petitioner had lost at all three levels of the Utah courts, but the Utah Supreme Court held that the petitioner's claim, although losing, was "not frivolous . . . and therefore was *not* without merit" because it presented a legal question that was previously undecided by the state's highest court. 215 P.3d at 134 (emphasis added).

Similarly, in *Martin v. Rasmussen*, the Utah Court of Appeals explained that although the plaintiffs' argument was "unsuccessful below and on appeal," it "cannot be deemed 'without merit'" under section 78B-5-825 because it did not "completely lack a basis in law or fact." 334 P.3d 507, 513 (Utah Ct. App. 2014); *see also Utah Telecomm. Open Infrastructure Agency v. Hogan*, 294 P.3d 645, 651 (Utah Ct. App. 2013) (affirming the trial court's finding that plaintiff's claim was *not* "without merit," despite the fact that the trial court had ruled against plaintiff on the merits). Alton's contrary theory—that a party's "los[s] on the merits" means that "the objective ['without merit'] standard has . . . been met," Alton Br. at 4—cannot be squared with these cases.

Alton cites no case that actually holds that "without merit" means losing, or that imposes attorney-fee sanctions under Utah's civil attorney-fee statute merely on the basis that a party lost. Alton cites *Still Standing Stable, LLC v. Allen*, 122 P.3d 556 (Utah 2005), but that case does not even interpret the objective "without merit" component of Utah's civil attorney-fee statute. *See* 122 P.3d at 559-60. Because the appellant in *Still Standing* "d[id] not challenge the trial court's conclusion that the case was without merit," *id.* at 559, that question was not at issue on appeal—and it is fundamental that "[c]ourt decisions are authoritative *only* upon questions of law or fact actually presented, discussed and decided," *State v. Salt Lake Cnty.*, 85 P.2d 851, 858 (Utah 1938) (emphasis added). In any event, *Still Standing* did not hold that "without merit" means "losing," as Alton implies, but instead merely restated the statutory phrase "without merit"; it did not elaborate on what that phrase means. 122 P.3d at 559.

The other cases Alton cites likewise do not support its argument that "without merit" just means that a party lost. *See* Alton Br. at 3. Instead, these cases say quite the opposite. For example, *Cady* held that "without merit" in the attorney-fee context means "frivolous"—or having "little weight or importance having no basis in law or fact"—and explained that these phrases have an equivalent meaning. 671 P.2d at 151. *Wardley* explained that "[a] claim is without merit if it is 'frivolous,' is 'of little weight or importance having no basis in law or fact,' or 'clearly [lacks a] legal basis for recovery.'" 61 P.3d at 1018 (quoting *Cady*, 671 P.2d at 151). The court in *In re Discipline of Sonnenreich*

cited the same *Cady* standard. 86 P.3d 712, 725 (Utah 2004) (citing *Cady*, 671 P.2d at 151). And *Pennington v. Allstate Insurance Co.* applied an entirely different attorney-fee provision, Utah's Rule 11, *see* 973 P.2d 932, 938-39 (Utah 1988), thus rendering its comments on the hypothetical application of a separate attorney-fee statute, *see id.* at 939 n.3, unauthoritative dicta.[2] *See Jones v. Barlow*, 154 P.3d 808, 815 (Utah 2007) (explaining that a court's "musing on the potential outcome of a hypothetical situation" is "dicta" and thus "not binding" precedent).

This Board asked the parties to brief the meaning of Rule B-15's objective bad-faith element.[3] Alton's argument seems to be that a party's loss on the merits is sufficient to demonstrate objective bad faith. That argument makes no sense. *Someone* loses in every case, absent a settlement. Under Alton's theory, someone would therefore be acting in objective bad faith in essentially *every* case. (Indeed, Alton would have been acting in objective bad faith on the several motions it has lost.) That would distort "bad faith" beyond any reasonable interpretation, "discourage all but the most airtight claims," *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421-22 (1978), and chill public

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[2] In addition, *Pennington* did not say that the plaintiff's case was without merit *because* the defendant had prevailed, but that it was without merit *and* that the defendant had prevailed. 973 P.2d at 939 n.3.

[3] That there is an "objective" component to "bad faith" is well established in attorney-fee jurisprudence. *See, e.g., FDIC v. Schuchmann*, 319 F.3d 1247, 1250 (10th Cir. 2003). However, the Division may well be right that referring to both "objective" and "subjective" bad-faith elements could be confusing, and that using the term "frivolous" in lieu of the phrase "objective bad faith" would avoid that confusion. *See* DOGM Br. at 8-9.

participation in contravention of the Utah Coal Mining and Reclamation Act's purposes, *see* Utah Code Ann. § 40-10-2(4).

B. The concept of frivolousness is widely used in attorney-fee law, well understood, and straightforward for the Board to apply

The standard of frivolousness is widely used and well established in the attorney-fee context, as the Division and Petitioners have pointed out. DOGM Br. at 9-10; Pets.' Br. at 11-13. It is used by courts not only in applying the objective component of Utah's civil attorney-fee statute, but also in Rule 11 and in federal attorney-fee law. *See, e.g., Warner v. DMG Color, Inc.*, 20 P.3d 868, 874 (Utah 2000) (Utah R. App. P. 33); *Hess v. Johnston*, 163 P.3d 747, 750-51 (Utah Ct. App. 2007) (Utah R. Civ. P. 11); *Christiansburg Garment Co.*, 434 U.S. at 421-22 (Title VII); *Indep. Lift Truck Builders Union v. NACCO Materials Handling Grp., Inc.*, 202 F.3d 965, 968-69 (7th Cir. 2000) (Fed. R. Civ. P. 11). Indeed, "[f]ee-shifting statutes *usually* . . . allow[] fees to be awarded to a prevailing defendant *only* if the suit was frivolous." *Stover v. Hattiesburg Pub. Sch. Dist.*, 549 F.3d 985, 997 (5th Cir. 2008) (internal quotation marks omitted) (emphases added). Thus, the Board has available to it a substantial body of law elaborating and applying the frivolousness standard in the context of attorney fees to help guide it in applying this standard under Rule B-15.

As courts in all of these separate attorney-fee contexts have held, litigation is frivolous only if it had "no basis in law or fact." *Cady*, 671 P.2d at 151. Of particular relevance here, and as the Division has explained, "'argument[s] for the extension,

modification, or reversal of existing law or the establishment of new law' are not necessarily frivolous even when they do not prevail." DOGM Br. at 10 (quoting Utah R. Civ. P. 11(b)(2)); *see also* Utah R. Prof'l Conduct 3.1 (stating that an "argument for an extension, modification or reversal of existing law" is "not frivolous" so long as it has "a basis in law and fact"). And a weak case, even a losing case, does not alone establish frivolousness: "[T]he party seeking an award of attorney fees must do more than assert that the case was unsuccessful." *Verdi Energy Grp.*, 326 P.3d at 115; *see also Neitzke v. Williams*, 490 U.S. 319, 329 (1989) ("[N]ot all unsuccessful claims are frivolous."); *Christiansburg Garment Co.*, 434 U.S. at 421 (holding that the fact that "the plaintiff has ultimately lost his case" is insufficient to demonstrate that the case was "frivolous, unreasonable, or without foundation"). What is required is something far more extreme: that the claims were "so deficient that [the party] could not have reasonably believed them to have a basis in law or in fact." *Verdi Energy Grp.*, 326 P.3d at 115.

Alton is also mistaken in suggesting that the frivolousness standard would require the Board to "essentially retry the case." Alton Br. at 5. This case has long-since been tried and decided. Instead, the Board would simply assess whether the existing record shows that Petitioners' permit challenge was "frivolous, i.e., the legal position [had] no chance of success, and there [was] no reasonable argument to extend, modify or reverse the law as it [stood]." *Star Mark Mgmt., Inc. v. Koon Chun Hing Kee Soy & Sauce Factory, Ltd.*, 682 F.3d 170, 177 (2d Cir. 2012) (internal quotation marks omitted); *see also,*

e.g., *Verdi Energy Grp.*, 326 P.3d at 115 (similar). Because "frivolousness" requires a showing of extreme misconduct, it is easy to apply. And "frivolousness" is a standard that Utah courts already regularly apply when awarding attorney fees in other contexts. *See Warner*, 20 P.3d at 874 (Utah R. App. P. 33); *Hess*, 163 P.3d at 750-51 (Utah R. Civ. P. 11); *Cady*, 671 P.2d at 151 (Utah Code Ann. § 78B-5-825). It should be applied here.[4]

C. Discovery will not help the Board evaluate Alton's assertion that Petitioners' challenge was without merit

Although Alton suggests that discovery may provide evidence relevant to the objective prong of Rule B-15, *see* Alton Br. at 5 & n.3, Alton has not cited a single case in which *any* Utah court has ever permitted or considered post-merits discovery related to the determination of whether attorney fees were appropriate under a frivolousness or "without merit" standard. In *Valcarce v. Fitzgerald*, the only case cited by Alton in its recent brief to try to justify further discovery, the court looked to the existing trial record to make the "without merit" decision, *without* further discovery. 961 P.2d 305,

[4] While the Board has not yet invited briefing on whether Petitioners' underlying claims were frivolous, they were not. Alton's critiques of Petitioners' litigation rest more on vitriol than analysis. For example, Alton's brief stridently contends that the Utah Supreme Court dismissed Petitioners' recent petition for extraordinary relief because the petition was meritless. Alton Br. at 2-3. The Supreme Court's dismissal order shows that contention to be false. The Supreme Court dismissed the petition for extraordinary relief because, after the petition was filed, this Board resolved "the primary request for relief *in Petitioners' favor*." Utah S. Ct. Order (Dec. 10, 2014) (emphasis added); *see also* Board Suppl. Order Concerning Renewed Mot. for Leave to Conduct Disc. 4 (Nov. 3, 2014) (ruling for Petitioners, and against Alton, that Rule B-15 has an objective element). Thus, contrary to Alton's contention, the Supreme Court dismissed the petition *not* because it was meritless, but because the Board's intervening order in Petitioners' favor rendered moot the petition's main request for relief.

315 (Utah 1998). Other Utah courts have likewise decided whether litigation was "without merit" by considering the evidence in the trial record. *See, e.g., In re Sheville*, 71 P.3d 179, 182 (Utah Ct. App. 2003). Moreover, evidence concerning "the 'purpose' behind [a party's] action . . . is not relevant to whether the action lacked merit." *Utah Telecomm. Open Infrastructure Agency*, 294 P.3d at 651. The "without merit," or objective frivolousness, question is instead whether the case *as already presented* to the Board was frivolous. That question turns only on the existing litigation record.[5]

Moreover, it is clear from Utah case law that the "without merit" test is a question of law, not a question of fact. *Utah Telecomm. Open Infrastructure Agency*, 294 P.3d at 650. As the Division has explained, deciding this legal question "does not require the use of new discovery or facts outside the record." DOGM Br. at 14. The question of whether Petitioners' permit challenge "completely lack[ed] a basis in law or fact," *Martin*, 334 P.3d at 513, thus does not require new discovery.

The Board should therefore not authorize discovery before determining whether Alton can demonstrate frivolousness. If Alton is unable to make that threshold

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[5] For example, in *Valcarce*, the trial record showed that the plaintiff's claim was grounded in falsified testimony. 961 P.2d at 315. Alton has already had the right to conduct discovery concerning the testimony Petitioners presented at trial, and never claimed that testimony was falsified. What Alton now seeks is discovery into Petitioners' *purposes*. That is irrelevant to whether the case as already presented to the Board was objectively frivolous.

showing, then its discovery is irrelevant, unduly burdensome, and impermissible under Utah Rules of Civil Procedure 26(b).[6]

II. Rule B-15 does not permit an attorney-fee award to Alton if Petitioners had any good faith basis for their permit challenge

Rule B-15 allows attorney fees to be awarded to a permittee only where the person initiated the *proceeding*, or participated in it, in bad faith for the purpose of embarrassing or harassing the permittee. The best reading of this rule is that it does not allow a permittee to recover attorney fees against a person who had an objective good-faith (that is, non-frivolous) basis to challenge a permit. Because such a person had an objective good-faith basis for the permit challenge, the person did not initiate or participate in the proceeding in objective bad faith.

This reading of Rule B-15 is supported by *Dahl v. Harrison*, 265 P.3d 139 (Utah Ct. App. 2011). That case held that Utah's civil attorney-fee statute, Utah Code Ann. § 78B-5-825, does not allow an award of attorney fees simply because a particular motion is without merit (i.e., is frivolous); the whole *action* has to have been without

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[6] Alton seeks to uncover through discovery information concerning, for example, the "persons who participated in [Petitioners'] decision making process that authorized" the filing of the permit challenge; internal memos and correspondence "discussing, approving or initiating the [permit challenge] or any action involving Alton or the Coal Hollow Mine"; and "correspondence to donors or other financial supporters of Petitioners relating to the [permit challenge]." Alton Br. at 7-8. This information is not relevant to whether Petitioners' permit challenge as presented to the Board was frivolous.

merit.[7] *Dahl*, 265 P.3d at 149-50. Likewise, under Rule B-15, a permittee cannot recover fees unless the whole *proceeding* was frivolous, and that standard is not met when the permit challenger had a non-frivolous basis for initiating or participating in the proceeding. This is why Rule B-15, unlike Utah Rule of Civil Procedure 11, does not expressly allow attorney fees to be recovered whenever a particular contention or motion—i.e., whenever a *subpart* of the proceeding—was in objective and subjective bad faith.

Reading Rule B-15 in this way would allow the Board to avoid determining whether each specific claim in the underlying litigation was frivolous. Instead, a finding by the Board that even one claim was not frivolous would end the Board's work on this attorney-fee issue.

Alton and the Division make a policy argument, based on *Fox v. Vice*, 131 S. Ct. 2205 (2011), that attorney fees should be apportioned claim by claim to discourage a person from hiding frivolous claims among non-frivolous claims. That concern can be fully addressed through other procedures, with far less burden to the Board. For example, under Utah Rule of Professional Conduct 3.1, an attorney who makes a frivolous or bad-faith claim can be sanctioned, ordered to pay monetary restitution to

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[7] There are cases that assumed but did not have cause to decide that Utah Code Ann. § 78B-5-825 allows attorney fees to be awarded for a frivolous and subjective bad-faith claim or motion. But none of those cases hold that *Dahl* was wrong. Instead, in those cases, the person against whom fees were sought apparently never argued that the statute did not allow fees to be awarded for a frivolous motion or claim, so the issue was waived. *See, e.g., Warner v. Warner*, 319 P.3d 711, 723 n.14 (Utah Ct. App. 2014).

the injured party, or even disbarred. *See* Utah R. Prof'l Conduct 3.1; *see also* Utah Code of Judicial Admin. 14-603. This rule, which applies to all attorneys practicing before the Board,[8] already provides an effective means of deterring frivolous legal claims. And because the attorney disciplinary rules are not enforced by the Board itself, a decision by the Board to rely on enforcement of those rules for deterrence would allow the Board to focus more of its energies on the important work of implementing Utah's coal program, rather than refereeing prolonged attorney-fee disputes.

III. If the Board determines that Rule B-15 allows attorney fees to be allocated, a permittee could recover only those attorney fees that would not have been incurred but for the frivolous claim

Although Petitioners assert that Rule B-15 does not envision any award of attorney fees against a person who had one or more non-frivolous claims, Petitioners recognize that it may be helpful to address *how* to allocate fees, in the event that the Board decides that some allocation is contemplated under Rule B-15.

The Division and Alton base their allocation approach on *Fox v. Vice*. *See* DOGM Br. at 12-13; Alton Br. at 6. *Fox* held that, where a federal civil-rights plaintiff brings both frivolous and non-frivolous claims, "a defendant may recover the reasonable attorney's fees he expended solely because of the frivolous allegations." 131 S. Ct. at 2218. But, "that is all." *Id.* "[I]f the defendant would have incurred those fees anyway, to defend against *non*-frivolous claims, then a court has no basis for transferring the expense to the

[8] Attorneys practicing *pro hac vice* specifically submit to this disciplinary authority as a condition of their admission to practice before this Board.

plaintiff." *Id.* at 2215. Otherwise, a permittee would be inappropriately rewarded for resisting *non*-frivolous claims. *Id.* at 2216.

Fox gives this helpful example of how such allocation works: "Suppose, for example, that a defendant's attorney conducts a deposition on matters relevant to both a frivolous and a non-frivolous claim—and more, that the lawyer would have taken and committed the same time to this deposition even if the case had involved only the non-frivolous allegation." *Id.* at 2215. "The defendant would have incurred the expense in any event; he has suffered no incremental harm from the frivolous claim." *Id.* Accordingly, the defendant may not recover for that attorney time. *Id.*

If the Board interprets Rule B-15 to allow the kind of claim-by-claim allocation that Alton and the Division propose, then Alton will need to prove what fraction of its attorney fees it incurred *solely* to defend any claims that it persuades the Board were frivolous. This may not be straightforward, and Alton, as the moving party, would have the burden of proof on these issues.

CONCLUSION

Rule B-15's objective prong requires Alton to show that Petitioners' permit challenge was frivolous. If Petitioners had a non-frivolous basis for their permit challenge, then no fees should be allowed under Rule B-15. If, however, the Board decides that fees may be allocated, then Alton will have to try to show that specific claims were frivolous, and what part of its fees were attributable *solely* to those claims.

The Division's proposed path forward makes sense regardless of how the Board resolves the issue of whether fees can be allocated. Threshold allegations of frivolousness can be decided on the existing record, without discovery. The Board should therefore direct Alton to identify all specific claims that it contends were frivolous, and the basis for its contentions. The Board should then direct the parties to brief this issue on the existing record. Unless Alton can convince the Board that specific claims were frivolous, discovery of Petitioners cannot be justified.

January 23, 2015

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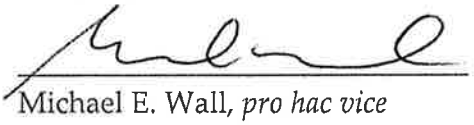

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of January, 2015, I served a true and correct copy of **REPLY BRIEF OF UTAH CHAPTER OF THE SIERRA CLUB ET AL., ON (1) THE MEANING OF RULE B-15'S OBJECTIVE BAD FAITH ELEMENT; AND (2) APPLICATION OF RULE B-15 IF THE BOARD FINDS THAT PETITIONER HAD AT LEAST SOME OBJECTIVE GOOD FAITH BASIS FOR CHALLENGING THE PERMIT** to each of the persons listed below via e-mail transmission.

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